



Robert Burks appeals his conviction by jury of battery as a class C felony<sup>1</sup> and his adjudication as an habitual offender.<sup>2</sup> Burks raises one issue, which we restate as whether the State improperly withheld evidence from Burks in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We affirm.

At approximately 3:00 a.m. on April 12, 2005, Indianapolis Police Department Officer David Smiley was dispatched to a Village Pantry on the south side of Indianapolis. When he arrived, Officer Smiley observed 47-year-old Deborah Ping standing in front of the store. Ping was sobbing and breathing heavily. Officer Smiley observed that Ping had severe facial injuries. Specifically, the officer noticed that Ping's eyes were nearly swollen shut, her cheeks were swollen and lacerated, and she had bite marks on her ears. Ping told Officer Smiley that Burks, her live-in boyfriend, had assaulted her in their apartment that was located about a block from the Village Pantry. According to Ping, Burks kicked her in the head and struck her with his fists and a wine bottle. As soon as Ping was transported by ambulance to the hospital, Officer Smiley went to Ping's apartment where he found and arrested Burks for assaulting Ping. Officer Smiley noticed a wine bottle with fresh blood on it in the kitchen trashcan.

The following day, Indianapolis Police Department Detective Robin Bennett went to Ping's apartment to take a statement from Ping and to photograph her injuries. Ping's

---

<sup>1</sup> Ind. Code § 35-42-2-1 (2004) (subsequently amended by Pub. L. No. 2-2005, Sec. 125 (eff. April 25, 2005)).

<sup>2</sup> Ind. Code § 35-50-2-8 (2004) (subsequently amended by Pub. L. No. 71-2005, Sec. 11 (eff. April 25, 2005)).

face was severely swollen, and her eyes were still almost swollen shut. During the meeting, Detective Bennett took the wine bottle that was in the kitchen trashcan and sent it to the crime lab. Officer Bennett met with Ping again on April 27, 2005, after Ping received a letter from an incarcerated Burks. At that meeting, Ping gave a taped statement that was never provided to Burks.

After Ping died in July 2005 of causes unrelated to the beating, Burks filed a motion to suppress all of Ping's statements as inadmissible hearsay. The trial court ordered that Ping's statements to Officer Smiley were admissible as excited utterances. However, the trial court suppressed Ping's statements to Officer Bennett. A jury convicted Burks of class C felony battery and adjudicated him to be an habitual offender.

At the sentencing hearing, the State attempted to introduce into evidence Ping's April 27 statement to Detective Bennett. Burks objected that the State did not provide the taped statement or its transcription to him during discovery and made an oral motion to set aside the jury's verdict and grant a new trial. The trial court subsequently issued an order reprimanding the State for failing to provide Ping's April 27 statement to Burks during discovery. However, the trial court further found that there was no Brady violation because the statement was not material.

As a preliminary matter, we note that the State argues that Burks has waived appellate review of this issue because he failed to follow the procedural steps for raising a Brady issue under Criminal Rule 16 and Trial Rules 59 and 61. See Hubbell V. State, 754 N.E.2d 884, 894 (Ind. 2001). Specifically, the State points out that an alleged Brady issue that comes to light after trial should be "raised by a motion for a new trial based on

newly discovered evidence, or a motion to correct error” within thirty days of the final judgment. Id.

In the Hubbell case, Hubbell addressed his claim of suppressed evidence for the first time on appeal without initially presenting his contentions to the trial court. In rejecting Hubbell’s claims, the Indiana Supreme Court explained that requiring a defendant to file a motion to correct error gives the trial court an opportunity to rule on the issue and may avoid an unnecessary appeal. Id. A defendant’s attempt to raise an issue on appeal without trial court review, and without a hearing in the trial court, puts the appellate court in the position of attempting to weigh credibility on an undeveloped paper record. Id. This is a task for the trial court because that court has the benefit of a detailed understanding of other evidence in the case and can best assess any potential prejudice as well as weigh the credibility of claims of new evidence. Id.

Here, after learning of the statement and the State’s failure to provide it to him during discovery, Burks made an oral motion for a new trial based upon the State’s discovery violation. The trial court heard arguments on the motion and issued a detailed six-page order, including findings of fact and conclusions of law, denying the motion. Although Burks did not base his motion on newly discovered evidence or file a motion to correct error, all of the concerns set forth in Hubbell have been satisfied by Burks’s oral motion and the arguments to the trial court on the motion. The trial court had an opportunity to hear arguments and thereafter issued a detailed order. Burks has not waived this issue. See, e.g., Prewitt v. State, 819 N.E.2d 393 (Ind. Ct. App. 2004), trans. denied, (holding that Prewitt did not waive Brady issue).

We now turn to the sole substantive issue for our review. That issue is whether the State improperly withheld Ping's April 27 statement in violation of Brady v. Maryland. In Brady, the United States Supreme Court held that suppression of evidence by the state that is favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97. To establish a Brady violation, the defendant must establish that: 1) the evidence at issue is favorable to the accused, either because it is exculpatory or impeaching; 2) the evidence was suppressed by the state, either willfully or inadvertently; and 3) the evidence was material to an issue at trial. Hayden v. State, 830 N.E.2d 923, 931 (Ind. Ct. App. 2005), trans. denied.

Additionally, a Brady violation arises if the defendant, using reasonable diligence, could not have obtained the information. Shanabarger v. State, 798 N.E.2d 210, 218 (Ind. Ct. App. 2003). Exculpatory evidence has been defined as that which clears or tends to clear a defendant from alleged guilt. Id. Further, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. Stated differently, the defendant must show that the evidence at issue reasonably could be taken to put the case in such a different light as to undermine confidence in the verdict. Id.

Here, our review of the transcript of Ping's April 27 statement reveals that the statement is neither exculpatory nor material. In the statement, Ping told Detective Bennett that Burks "beat [her] up bad." Volume of Exhibits at 51. Specifically, Ping told the detective that Burks hit her in the face with a wine bottle, kicked her with steel-toed

tennis shoes, and almost killed her. Ping also told the detective that she had a fractured nose and cheekbone and could not breathe out of the right side of her face. At the end of the statement, Ping again told Detective Bennett that Burks caused her injuries, and that she knew it was Burks because they were the only people in their apartment. This evidence does not tend to clear Burks of alleged guilt. In fact, it supports the State's charges against him.

In addition, the statement is not material because evidence of Ping's intoxication and lack of memory regarding her statements to Officer Smiley would not have put this case in such a different light so as to undermine confidence in the outcome. The State did not improperly withhold evidence from Burks in violation of Brady v. Maryland. See, e.g., Hayden, 830 N.E.2d at 931-2.

For the foregoing reasons, we affirm Burk's conviction for battery as a class C felony and his status as an habitual offender.

Affirmed.

NAJAM, J. and ROBB, J. concur